

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Protecting the Privacy of Customers of Broadband) WC Docket No. 16-106
and Other Telecommunications Services)
)

To: The Commission

**REPLY OF THE CONSUMER TECHNOLOGY ASSOCIATION
TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION**

The Consumer Technology Association (“CTA”)¹ hereby responds to oppositions (“Oppositions”)² to CTA’s and other stakeholders’ petitions for reconsideration (“Petitions”)³ of

¹ The Consumer Technology Association (“CTA”)™ is the trade association representing the \$292 billion U.S. consumer technology industry. More than 2,200 companies – 80 percent are small businesses and startups; others are among the world’s best known brands – enjoy the benefits of CTA membership including policy advocacy, market research, technical education, industry promotion, standards development, and the fostering of business and strategic relationships. CTA also owns and produces CES® – the world’s gathering place for all who thrive on the business of consumer technology. Profits from CES are reinvested into CTA’s industry services.

² Center for Democracy & Technology Opposition (filed Mar. 6, 2017) (“CDT Opposition”); Center for Digital Democracy *et al.* Opposition (filed Mar. 6, 2017) (“CDD Opposition”); Consumers Union and Consumer Federation of America Opposition (filed Mar. 6, 2017) (“CU/CFA Opposition”); Free Press Opposition (filed Mar. 6, 2017) (“Free Press Opposition”); New America’s Open Technology Institute Opposition (filed Mar. 6, 2017) (“OTI Opposition”); Opposition of Access Humboldt *et al.* (filed Mar. 6, 2017) (“PIC Opposition”); Public Knowledge *et al.* Opposition (filed Mar. 6, 2017) (“PK Opposition”) (collectively, “Oppositions”).

³ CTA Petition for Reconsideration (filed Jan. 3, 2017) (“CTA Petition”); American Cable Association Petition for Reconsideration (filed Jan. 3, 2017) (“ACA Petition”); Association of National Advertisers *et al.* Petition for Reconsideration (filed Jan. 3, 2017) (“ANA Petition”); Competitive Carriers Association Petition for Reconsideration (filed Jan. 3, 2017) (“CCA Petition”); CTIA Petition for Reconsideration (filed Jan. 3, 2017) (“CTIA Petition”); ITTA – The Voice of Mid-Size Communications Companies Petition for Reconsideration (filed Jan. 3, 2017) (“ITTA Petition”); NCTA – The Internet and Television Association Petition for Reconsideration (filed Jan. 3, 2017) (“NCTA Petition”); Oracle Petition for Reconsideration

the Federal Communications Commission’s (“Commission’s” or “FCC’s”) *Report and Order* (“*Order*”) in the above-captioned proceeding.⁴ The Petitions conclusively demonstrate the need to reconsider the Commission’s classification of web browsing history and app usage information as sensitive.⁵ Nothing in the Oppositions effectively rebuts this showing. Specifically, the Petitions show, among other things, that:

- Classifying web browsing and application usage information as sensitive, and thus subject to opt-in consent for most uses and disclosures, threatens to undermine innovation and competition in the dynamic internet ecosystem;⁶
- The record did not support the FCC’s classification, which ran counter to consumer and business expectations,⁷ nor did the record support adopting unique rules for internet service providers (“ISPs”) that differ from the Federal Trade Commission’s (“FTC’s”) approach for the remainder of the internet ecosystem;⁸
- The FCC failed to provide adequate notice of its intention to classify browsing history and app usage information as sensitive;⁹ and
- The *Order* fails entirely to assess the costs of its ISP-specific definition of sensitive information and weigh such costs against purported benefits.¹⁰

(filed Dec. 21, 2017) (“Oracle Petition”); United States Telecom Association Petition for Reconsideration (filed Jan. 3, 2017) (“USTelecom Petition”); Wireless Internet Service Providers Association Petition for Reconsideration (filed Jan. 3, 2017) (“WISPA Petition”) (collectively, “Petitions”).

⁴ *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, 31 FCC Rcd 13911 (2016) (“*Order*”).

⁵ See, e.g., CTA Petition at 2; CCA Petition at 8; CTIA Petition at 8.

⁶ See, e.g., CTA Petition at 2; CCA Petition at 11-12.

⁷ See, e.g., CTA Petition at 3-4; ACA Petition at 3; CCA Petition at 10-11.

⁸ See, e.g., CTA Petition at 4; ITTA Petition at 13; NCTA Petition at 16; Oracle Petition at 2.

⁹ See, e.g., CTA Petition at 10; ANA Petition at 12-13.

¹⁰ See, e.g., CTA Petition at 12; NCTA Petition at 19; ACA Petition at 19.

Despite this record – and a commitment by ISPs to adhere to the privacy and data security principles that apply to the rest of the internet ecosystem¹¹ – opponents of reconsideration attempt to sustain the flawed *Order* by ignoring its significant substantive and procedural flaws.¹² Yet, they cannot overcome the *Order*’s failure to justify its new, overbroad approach to sensitive data, nor can they vindicate the Commission’s failure to weigh the costs of such approach against any clear, concrete benefits. Accordingly, the Commission should instead correct its privacy approach and reconsider the *Order* by at least revising its rules to eliminate the categorization of all browsing history and application usage information as sensitive.

I. THE PETITIONS’ OPPONENTS CANNOT OVERCOME THE *ORDER*’S FAILURE TO JUSTIFY A NOVEL APPROACH TO SENSITIVE DATA

As CTA’s Petition explained, the *Order* failed to justify the departure from longstanding precedent and FTC recommendations with respect to what information should be considered sensitive and thus subject to opt-in consent.¹³ The *Order* summarily dismissed evidence regarding how ISPs could protect more sensitive browsing history and app usage information in

¹¹ See ISP Privacy Principles, attached to *ACA et al.* Joint Petition for Stay (filed Jan. 27, 2017).

¹² Several of the Oppositions assert that the Petitions should be dismissed because they rely on arguments considered and rejected by the FCC. See CDT Opposition at 5; OTI Opposition at 1; Free Press Opposition at 5-6; Public Knowledge Opposition at 1-2; PIC Opposition at 3-4. However, assuming *arguendo* that the Petitions raise arguments considered and rejected by the Commission, contrary to the claims otherwise, nothing in the Commission’s rules prohibit the agency from reconsidering its position on arguments even if “fully considered and rejected[.]” 47 C.F.R. § 1.4929(l) (noting examples under which petitions for reconsideration “may” be dismissed or denied); see also *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Order Granting Stay Petition in Part, FCC 17-19 ¶ 11 (rel. Mar. 1, 2017) (“[C]ontrary to the Opposition’s assertion that the Commission’s authority to grant petitions for reconsideration is limited to those which rely on facts or arguments which have not been previously presented to the Commission, the Commission’s rules simply permit the dismissal or denial of a petition that relies ‘on arguments that have been fully considered and rejected by the Commission within the same proceeding.’ The rules do not *require* such a dismissal or denial.”) (citations omitted).

¹³ CTA Petition at 3.

a more targeted fashion,¹⁴ and thus failed to explain why an opt-out approach for web browsing and app usage information – akin to the FTC’s approach – would be inadequate to protect consumers.¹⁵ And critically, the *Order* ignored the FTC staff’s expert guidance regarding what information should be considered sensitive and, by implication, the other information that should not.¹⁶

The *Order*’s backers cannot justify the *Order*’s failures. The Center for Democracy and Technology (“CDT”) suggests that the FTC’s recommendation was not intended to define the outer bounds of sensitive information.¹⁷ In reality, the FTC staff counseled against adopting unique rules for broadband internet access service (“BIAS”) providers – and the FTC, when assessing the exact same issue, declined to consider browsing history and similar information sensitive.¹⁸ The Center for Digital Democracy (“CDD”) *et al.* suggests that browsing and application history must be treated as sensitive to protect children.¹⁹ But again, the FTC – the United States’ primary privacy regulator that has been charged by Congress to adopt and enforce rules to protect children’s privacy online²⁰ – has never found that defining web browsing and app usage information as sensitive was necessary to, and in fact the only way to, protect children on the internet.

¹⁴ *See id.* at 3-10.

¹⁵ *See, e.g.,* ITIF Comments at 2-4 (filed Mar. 6, 2017) (“ITIF Comments”).

¹⁶ *Id.* at 6-7.

¹⁷ CDT Opposition at 20.

¹⁸ *See* CTA Petition at 5-7.

¹⁹ CDD Opposition at 5-7.

²⁰ *See* Children’s Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501-6505.

Some of the opponents to reconsideration echo the *Order*'s assertions that the FCC's new privacy rules are in harmony and consistent with those of the FTC.²¹ They are mistaken. Under the FTC's approach, any company other than an ISP – even those with as much or more visibility into consumers' online activities – is free to collect and use such information without opt-in approval. The *Order* prohibits ISPs from doing the same thing. In addition, CDD *et al.* claim that the FCC's rules for children's privacy are "consistent with the FTC's approach,"²² but this is plainly incorrect. The Children's Online Privacy Protection Act and the FTC's implementing rule only restrict an online service provider's collection of web browsing and app usage information if the provider has actual knowledge it is collecting information from a child or the website or service at issue is directed to children.²³

Other opponents acknowledge the departure from the FTC's approach and argue that ISPs should be held to a "higher standard" than edge providers because of the scale and scope to which ISPs have access.²⁴ And yet, several of these same opponents also argue that the FCC was not obligated to enact the same privacy regime as the FTC.²⁵ They suggest that edge providers' collection abilities are a "non-sequitur" with respect to the FCC's privacy regime.²⁶ They ignore,

²¹ See CDT Opposition at 16-19; CDD Opposition at 2-3. *But see* CTA Petition at 7 ("[T]he *Order* ignores at least two critical recommendations by the FTC" and "does so without clearly acknowledging, let alone explaining adequately, its departure from FTC precedent and staff recommendations.").

²² CDD Opposition at 2-3.

²³ See 15 U.S.C. § 6502(a); 16 C.F.R. § 312.3.

²⁴ CU/CFA Opposition at 3; *see also* Free Press Opposition at 9; OTI Opposition at 6-8, 11; PIC Opposition at 2-3.

²⁵ PIC Opposition at 4-5; Free Press Opposition at 10.

²⁶ Free Press Opposition at 10.

however, a fundamental principle of agency rulemaking – agency rules must be rational and reasonable.²⁷ Departing without a clear explanation from the FTC’s expert recommendations and approach substantially undermines the rationality of the *Order*.²⁸

II. THE OPPOSITIONS DO NOT – AND CANNOT – MITIGATE THE FCC’S FAILURE TO FULLY CONSIDER THE COSTS OF ITS OVERBROAD SENSITIVITY CLASSIFICATION

Opponents of the Petitions also cannot justify the *Order*’s failure to fully consider the costs of its sensitivity classification, which far outweigh any benefits.²⁹ Indeed, the costs of the FCC’s overbroad category of sensitive information were clearly demonstrated in the record: Prices may increase while innovation and investment decrease,³⁰ and consumer confusion may ensue while consumer choice is reduced.³¹ The benefits of flexible, data-driven innovation also

²⁷ See *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 535 (8th Cir. 1998) (citing *MCI Telecomms. Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982)) (“The question for this Court is ... whether the agency’s choice is a reasonable one.”).

²⁸ See Comments of Justin (Gus) Hurwitz at 3-4 (filed Mar. 6, 2017) (“The FCC’s opt-in approach marks a clear break from regulatory experience and practice and academic research. The sorts of information and the uses of that information at issue in the modern context are only superficially similar to those presented by traditional CPNI.”).

²⁹ See CTA Petition at 12-15; see also, e.g., ACA Petition at 19; WISPA Petition at 18-19; Freedom Works Comments at 2 (filed Mar. 6, 2017) (“Freedom Works Comments”); Institute for Policy Innovation Comments at 2-3 (filed Mar. 6, 2017) (“IPI Comments”); Internet Commerce Coalition Comments at 4-5 (filed Mar. 6, 2017) (“ICC Comments”).

³⁰ See, e.g., CTA Petition at 13-14; Citizens Against Government Waste Comments at 2; Freedom Works Comments at 3, 7; IPI Comments at 1; International Center for Law & Economics at 5 (filed Mar. 6, 2017) (“ICLE Comments”); ICC Comments at 4-5. Indeed, one opponent to reconsideration seems to support adding additional costs to ISPs – costs that ultimately will be borne by consumers – if they wish to compete in the advertising market, suggested that ISPs can “establish separate, independent affiliates that collect and use consumer information.” CU/CFA Opposition at 3.

³¹ See, e.g., Debra Diener Comments at 1-2 (filed Mar. 6, 2017); Freedom Works Comments at 3, 9; ICLE Comments at 6.

are clear.³² The benefits of the FCC’s overly broad definition of sensitive personal information, however, are not. As the Technology Policy Institute explains,

The benefits of data do not mean that privacy concerns are irrelevant or that privacy rules are unnecessary. But they do mean that costs and benefits of the rules affecting data availability and use must be considered carefully. Even when some benefits are not easily quantified, such as if privacy rules make consumers feel more secure, even an attempt at enumerating the two sides of the ledger facilitates good decision-making. The Order makes no attempt to do so, and ignoring the tradeoff leaves it with no way to think systematically about whether any benefits of the Order outweigh potential harms or if the Order is superior to the FTC’s privacy rules.³³

Those parties that support the *Order* simply cannot justify the FCC’s failure to conduct a cost-benefit analysis of its overbroad sensitivity classification, including its failure to prove that an opt-in approach to the use of web browsing history and app usage information better serves consumers than the opt-out approach used by the FTC. They merely offer assumed, but unsupported benefits;³⁴ suggestions about ISPs being different without adequately explaining why an opt-in approach is superior to an opt-out approach;³⁵ and claims that Section 222 supports the FCC’s approach to broadband and web browsing and app usage information, none of which are raised in Section 222.³⁶ But the *Order*’s approach is unproven, and is never called

³² See CTA Petition at 13-14 (citing record to note consumer benefits from online advertising and individualized content and Internet economy growth from online advertising); see also ITIF Comments at 2-4 (noting benefits of data sharing and use).

³³ Technology Policy Institute Comments at 5 (filed Mar. 6, 2017).

³⁴ See, e.g., CDD Opposition at 7 (claiming children’s personal information would have little or no protection under an opt-out approach).

³⁵ See, e.g., CU/CFA Opposition at 3 (claiming ISPs have far more intimate knowledge of consumers’ online activities than edge providers).

³⁶ See, e.g., PIC Opposition at 4-5 (claiming targeted privacy protections like Section 222 are more appropriate for services like broadband, “as Congress envisioned”).

for by the statute.³⁷ The FCC's failure to conduct a cost-benefit analysis – particularly when combined with the agency's failure to adequately consider the expert recommendations of FTC staff – undermines both the *Order's* conclusions and its lawfulness. The *Order*, therefore, should be reconsidered.

III. CONCLUSION

The Commission's decision to require BIAS providers to categorically treat web browsing and app usage information as sensitive represents a substantial – and baseless – departure from the FTC's sound framework for the internet ecosystem. In adopting this novel, ISP-specific approach, the FCC ignored expert guidance from the FTC, as well as the weight of the record. It also underestimated the costs of such approach, and overestimated supposed benefits. Nothing in the Oppositions demonstrates otherwise. Accordingly, the FCC should grant the Petitions and reconsider the *Order* to ensure that any FCC privacy rules are consistent with the FTC's longstanding and effective online privacy framework.

³⁷ In fact, as Petitioners show, there are serious questions about the FCC's legal authority to adopt the rules it did in the *Order*. See ACA Petition at 5; ANA Petition at 6-12; CCA Petition at 3-5; CTIA Petition at 2-5; ITTA Petition 3-9; NCTA Petition at 4-12; USTelecom Petition at 22-24; WISPA Petition at 5.

Respectfully submitted,

CONSUMER TECHNOLOGY
ASSOCIATION

By: /s/ Julie M. Kearney

Julie M. Kearney
Vice President, Regulatory Affairs

Consumer Technology Association
1919 S. Eads Street
Arlington, VA 22202
(703) 907-7644

March 16, 2017

CERTIFICATE OF SERVICE

I, Ayanna Lewis, hereby certify that on this 16th day of March, 2017, a copy of the foregoing Reply to Oppositions to Petitions for Reconsideration was served by first-class mail, postage prepaid, upon the following:

Natasha Duarte
Chris Calabrese
Michelle De Mooy
Center for Democracy & Technology
1401 K St. NW, Suite 200
Washington, D.C. 20005

Angela J. Campbell
Chris Laughlin
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Katie McInnis
Consumers Union
1101 17th Street, NW
Washington DC 20036

Susan Grant
Consumer Federation of America
1620 I Street NW, Suite 200
Washington, DC 20006

Gaurav Laroia
Matthew F. Wood
Free Press
1025 Connecticut Avenue, N.W. Suite 1110
Washington, D.C. 20036

Eric Null
New America's Open Technology Institute
740 15th St NW, Suite 900
Washington, DC 20005

Dallas Harris
Public Knowledge
1818 N Street NW, Suite 410
Washington, DC 20036

Amina N. Fazlullah
Benton Foundation
1875 K Street NW, Suite 400
Washington DC 20006

Katharina Kopp, Ph.D.
Center for Digital Democracy
1875 K Street NW, 4th floor
Washington, DC 20036

By: /s/ Ayanna Lewis
Ayanna Lewis